630 (20)

Office - Supreme Court, U. S.
FILED
MAY 26 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. ~~1085~~ 106

STATE OF MISSISSIPPI FOR THE USE AND BENEFIT OF J. E. SHOEMAKER, ADMINISTRATOR OF THE ESTATE OF RAY GRANT, DECEASED,

Petitioner,

versus

J. F. THAMES AND UNITED STATES FIDELITY & GUARANTY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPELAS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

R. W. THOMPSON, JR.,
WEBB M. MIZE,
FRANK F. MIZE,
Counsel for Petitioner.

SUBJECT INDEX.

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	1
Reasons relied on for allowance of writ	3
1. Decision of Circuit Court of Appeals in conflict with decisions of United States Supreme Court	3
2. Decision of Circuit Court of Appeals in conflict with decisions of the Circuit Court of Appeals	4
3. Decision of Circuit Court of Appeals ignores Rule 17 (a) of Federal Rules of Civil Procedure	4
Prayer for writ	4
Brief supporting petition for writ	7
I. Opinion of court below	7
II. Jurisdiction	8
III. Statement of case	8
IV. Specifications of error	9
Summary of argument	10
Argument	10
A. The decision of the court below is contrary to and in conflict with prior decisions of this Court, decisions of other Circuit Courts, and ignored Rule 17 (a) of Federal Rules of Civil Procedure	12
B. The Circuit Court erred in refusing to consider the cause on its merits and in refusing jurisdiction and in not affirming the judgment of the District Court	16
Conclusion	16

TABLE OF AUTHORITIES.

Berryhill v. Nichols, 171 Miss. 769, 158 So. 470	14
Bradford Electric Light Co. v. Clapper, 284 U. S. 221, 76 L. Ed. 254	8
Bullard v. City of Cisco, 290 U. S. 179, 78 L. Ed. 254	3, 10, 12
Chambers, et al., v. Anderson, 58 Fed. (2nd) 151	4, 11
City of Detroit v. Blanchfield, 13 Fed. (2nd) 13	4, 11
City of New Orleans v. Whitney, 138 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102	3, 10
Conklin v. Alabama & V. Railroad Co., 81 Miss. 152, 32 So. 920	13
Continental Life Ins. Co. v. Rhoads, 119 U. S. 237, 7 S. Ct. 193, 30 L. Ed. 380	3, 11
Curb & Gutter District No. 37 of City of Fayetteville, Ark., et al., v. Parrish, 110 Fed. (2nd) 902	4, 11

TABLE OF AUTHORITIES—(Continued)

	Page
Douglas v. Daniels Bros. Coal Co., 135 Ohio St. 641, 22 N. E. (2d) 195, 125 A. L. R. 761, 766	14
Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 118	15, 16
Forsythe v. Hammond, 166 U. S. 506, 41 L. Ed. 1095	3, 8
Grenada Bank v. Petty, 174 Miss. 415, 164 So. 316	14
Guarantee Trust Co. v. Collins, et al., 76 Fed. (2nd) 870	4, 11
Hamel v. So. R. Co., 108 Miss. 172, 66 So. 426, 809	13
Hamilton Brown Shoe Co. v. Wolf Bros. Co., 240 U. S. 251, 60 L. Ed. 629	8
Hammel v. Burnet, 287 U. S. 103, 110	15
Hess v. Reynolds, 113 U. S. 73, 58 S. Ct. 377, 28 L. Ed. 927	3, 10
Hill v. Henderson, 6 Sneeds & Marshall 351	13
Hinds, Edward, Yellow Pine Trustees v. Stewart, 135 Miss. 331, 100 So. 12	13
Kloeb v. Armour & Co., 85 Adv. Op. 156, 61 S. Ct. Rep. 213, U. S. Law Week, p. 4065 (No. 65)	15
Mason City & Ft. Dodge Ry. Co. v. Boynton, 204 U. S. 570	15
McNeeley v. Natchez, 148 Miss. 268, 114 So. 484	13
McVey v. Illinois Cent. Railroad Co., 73 Miss. 487, 19 So. 209	13
Mecom, Adm., v. Fitzsimmons Drilling Co., 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233, 77 A. L. R. 904	3, 8, 10, 12
Memphis State Railway Co. v. Moore, Adm., 243 U. S. 299, 37 S. Ct. 273, 61 L. Ed. 733	3, 10
Mexican Central Ry. Co. v Eckman, 187 U. S. 429, 23 S. Ct. 211, 47 L. Ed. 245	3, 10, 12
Mississippi Code of 1930, Sections 510, 673, 674, 1628, 1712	19-22
Miss. Power Co. v. Archibald, 196 So. 760	9, 12, 13
Miss. Power & Light Co. v. Smith, 169 Miss. 447, 153 So. 376	13
Mobile, J. & K. C. R. Co. v. Hicks, 91 Miss. 273, 46 So. 360, 124 Am. St Rep. 679	13
Newman Lumber Co. v. Scipp, 128 Miss. 322, 91 So. 11	13
Payne v. Hook, 19 L. Ed. 260	3, 10
Rice v. Houston, 13 Wall. 66, 20 L. Ed. 484	3, 11
Susquehanna & Wyoming Valley R. R. & Coal Co. v. Blatchford, 11 Wall. 172, 20 L. Ed. 179	3, 11
The Shamrock Oil & Gas Corp. v. G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Co., decided by U. S. Supreme Court on April 28, 1931, No. 727	15
Wagner v. Gibbs, 80 Miss. 53, 31 So. 434, 92 Am. St. Rep. 598	13
Yazoo & M. V. R. Co. v. Jeffries, Admx., 99 Miss. 534, 55 So. 354	13
Appendix (Mississippi Code of 1930, Sections 510, 673, 674, 1628, 1712)	19-22

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. _____

STATE OF MISSISSIPPI FOR THE USE AND BENEFIT OF J. E. SHOEMAKER, ADMINISTRATOR OF THE ESTATE OF RAY GRANT, DECEASED,

Petitioner,

versus

J. F. THAMES AND UNITED STATES FIDELITY & GUARANTY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of the State of Mississippi for the use and benefit of J. E. Shoemaker, Administrator of the Estate of Ray Grant, deceased, respectfully shows unto this Honorable Court:

A.

Summary Statement of Matter Involved.

J. E. Shoemaker, a resident citizen of the State of Louisiana was appointed Administrator of the Estate of Ray Grant, deceased, by the Chancery Court of Hinds County,

Mississippi, and was authorized by the said Mississippi Chancery Court to file a suit for wrongful death against J. F. Thames, the Superintendent of the Mississippi State Penitentiary, a citizen of Mississippi, and his surety on his official bond, the United States Fidelity & Guaranty Company, a Maryland Corporation, who had qualified to do business in Mississippi and who was doing business in Mississippi.

Suit was thereupon filed in the United States District Court for the Northern Division of the Southern District of Mississippi. Jurisdiction was based on amount involved (amount being in excess of $3,000) and on diversity of citizenship, the plaintiff being a resident citizen of the State of Louisiana, and the defendant, J. F. Thames, being a resident citizen of the State of Mississippi, the surety company being a corporation domiciled and existing under Maryland laws but qualified and doing business in Mississippi.

Motion to dismiss was made alleging that the heirs at law of Ray Grant, deceased, were citizens of Mississippi and that their citizenship and not the citizenship of the Administrator was controlling and that therefore there was no diversity of citizenship so as to give the United States Court jurisdiction. This motion to dismiss was overruled. The cause was tried and resulted in a judgment against the defendant in the sum of $20,000.00. Subsequently, the defendants made a motion to have the ver-

dict and judgment set aside and judgment entered for defendants notwithstanding verdict. The District Court overruled the motion and wrote a very able opinion. The case was then appealed to the United States Circuit Court of Appeals for the Fifth Circuit, where the cause was reversed and remanded by a divided court on jurisdictional grounds alone with directions to the District Court to dismiss the case.

B.

Reasons Relied On for Allowance of the Writ.

The reasons upon which a writ of certiorari should be granted are as follows:

1. The decision of the Circuit Court of Appeals in this cause is in direct conflict with decisions of the Supreme Court of the United States in the following cases:

Mecom, Adm., v. Fitzsimmons Drilling Co., 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233, 77 A. L. R. 904.

Mexican Central Ry. Co. v. Eckman, 187 U. S. 429, 23 S. Ct. 211, 47 L. Ed. 245.

Hess v. Reynolds, 113 U. S. 73, 58 S. Ct. 377, 28 L. Ed. 927.

City of New Orleans v. Whitney, 138 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102.

Bullard v. City of Cisco, 290 U. S. 179, 78 L. Ed. 254.

Memphis State Railway Co. v. Moore, Adm., 243 U. S. 299, 37 S. Ct. 273, 61 L. Ed. 733.

Susquehanna & Wyoming Valley R. R. & Coal Co. v. Blatchford, 11 Wall. 172, 20 L. Ed. 179.

Continental Life Ins. Co. v. Rhoads, 119 U. S. 237, 7 S. Ct. 193, 30 L. Ed. 380.

Rice v. Houston, 13 Wall. 66, 20 L. Ed. 484.

Payne v. Hook, 19 L. Ed. 260.

2. The decision of the Circuit Court of Appeals in this cause is in direct conflict with the decisions of the Circuit Court of Appeals for the Third, Sixth and Eighth Circuits in the following cases:

City of Detroit v. Blanchfield, 13 Fed. (2nd) 13 (Sixth Circuit).

Chambers, et al. v. Anderson, 58 Fed. (2nd) 151 (Sixth Circuit).

Guarantee Trust Co. v. Collins, et al., 76 Fed. (2nd) 870 (Third Circuit).

Curb & Gutter District No. 37 of City of Fayetteville, Ark., et al. v. Parrish, 110 Fed. (2nd) 902 (Eighth Circuit).

3. The decision of the Circuit Court of Appeals in this cause ignores Rule 17 (a) of the Federal Rules of Civil Procedure.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directing the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 9632, "J. F. Thames v. State of Mississippi for the use and benefit of J. E. Shoemaker, Administrator of the Estate of Ray Grant, and United States Fidelity & Guaranty Company v. State of Mississippi for the use and benefit of J. E. Shoemaker, Administrator of the Estate of

Ray Grant", and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court and that the judgment of the District Court for the Southern District of Mississippi may be affirmed and that your petitioner may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioner will ever pray.

R. W. THOMPSON, JR.,
Gulfport, Mississippi;
WEBB M. MIZE,
Gulfport, Mississippi;
FRANK F. MIZE,
Forest, Mississippi;
Counsel for Petitioner.

By_____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. _____

STATE OF MISSISSIPPI FOR THE USE AND BENEFIT OF J. E. SHOEMAKER, ADMINISTRATOR OF THE ESTATE OF RAY GRANT, DECEASED,

Petitioner,

versus

J. F. THAMES AND UNITED STATES FIDELITY & GUARANTY COMPANY,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit is found at page 251 of the Record and was written on February 27, 1941 and is reported in 117 Fed. (2nd) page 949. The dissenting opinion of Judge Holmes is found at page 257 of the Record. The opinion of the District Court is found at page 232 of the Record.

II.

Jurisdiction.

1.

Jurisdiction is invoked under the Judicial Code, Section 240 as amended; 43 Statutes at Large 938; Section 347 U. S. C. A. 28.

2.

Jurisdiction is sustained by *Forsythe v. Hammond*, 166 U. S. 506, 41 L. Ed. 1095; *Hamilton Brown Shoe Co. v. Wolf Bros. Co.*, 240 U. S. 251, 60 L. Ed. 629; *Bradford Electric Light Co. v. Clapper*, 284 U. S. 221, 76 L. Ed. 254; *Mecom v. Fitzsimmons Drilling Co.*, 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233, 77 A. L. R., in this, that:

(a) Decisions holding that the citizenship of an administrator of an estate must be looked to in determining federal jurisdiction were ignored.

(b) Decisions of the Circuit Court of Appeals of the other circuits announcing the principle of law set out above were entirely ignored and are in conflict with the decisions of the Court in the instant case.

(c) Rule 17 of the Federal Rules of Civil Procedure was ignored by the majority opinion of the Circuit Court of Appeals for the Fifth Circuit in this cause.

III.

Statement of the Case.

Reference is respectfully made to "Summary Statement of Matter Involved", *supra*, in the petition for certiorari.

IV.

Specifications of Error.

Specification No. 1.

The Court erred in finding and holding that the United States District Court for the Southern District of Mississippi did not have jurisdiction.

(a) The suit was brought by J. E. Shoemaker, Administrator of the Estate of Ray Grant, deceased, against J. F. Thames, Superintendent of the Mississippi State Penitentiary, and the United States Fidelity & Guaranty Company for acts of negligence in official duty on the part of the said J. F. Thames. The complaint and exhibits are found in the record at pages 1 to 12. J. E. Shoemaker was a resident citizen of the State of Louisiana. J. F. Thames was a resident citizen of Mississippi. The United States Fidelity & Guaranty Company was a Maryland Corporation but was qualified to do business in Mississippi. The amount in controversy exceeded Three Thousand ($3,000) Dollars, exclusive of interest and costs.

(b) Sections 510, 1628 and 1712 of the Mississippi Code of 1930 authorize a personal representative to sue in his own name.

(c) The Mississippi case of the *Mississippi Power Co. v. Archibald*, 196 So. 760, does not take away the right of the administrator to sue in his own name.

(d) Damages for pain and suffering under Mississippi law cannot be recovered by the heirs of a deceased person but can only be recovered by the personal representative.

(e) Jurisdiction of the Federal Courts is for the decision of the Federal Courts themselves and cannot be varied by State Court decisions.

Specification No. 2.

The Circuit Court of Appeals for the Fifth Circuit erred in reversing the District Court and erred in not affirming the judgment of the Distict Court.

Specification No. 3.

The Circuit Court of Appeals for the Fifth Circuit erred in refusing to consider the cause on its merits and in refusing to sustain jurisdiction.

SUMMARY OF ARGUMENT.

Point A.

The reasons upon which a writ of certiorari should be granted are as follows:

1. The decision of the Circuit Court of Appeals in this cause is in direct conflict with decisions of the Supreme Court of the United States in the following cases:

Mecom, Adm., v. Fitzsimmons Drilling Co., 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233, 77 A. L. R. 904.

Mexican Central Ry. Co. v. Eckman, 187 U. S. 429, 23 S. Ct. 211, 47 L. Ed. 245.

Hess v. Reynolds, 113 U. S. 73, 58 S. Ct. 377, 28 L. Ed. 927.

City of New Orelans v. Whitney, 138 U. S. 595, 11 S. Ct. 428, 34 L. Ed. 1102.

Bullard v. City of Cisco, 290 U. S. 179, 78 L. Ed. 254.

Memphis State Railway Co. v. Moore, Adm., 243 U. S. 299, 37 S. Ct. 273, 61 L. Ed. 733.

Susquehanna & Wyoming Valley R. R. & Coal Co. v. Blatchford, 11 Wall. 172, 20 L. Ed. 179.

Continental Life Ins. Co. v. Rhoads, 119 U. S. 237, 7 S. Ct. 193, 30 L. Ed. 380.

Rice v. Houston, 13 Wall. 66, 20 L. Ed. 484.

Payne v. Hook, 19 L E.d. 260.

2. The decision of the Circuit Court of Appeals in this cause is in direct conflict with the decisions of the Circuit Court of Appeals for the Third, Sixth and Eighth Circuits in the following cases:

City of Detroit v. Blanchfield, 13 Fed. (2nd) 13 (Sixth Circuit).

Chambers, et al. v. Anderson, 58 Fed. (2nd) 151 (Sixth Circuit).

Guarantee Trust Co. v. Collins, et al., 76 Fed. (2nd) 870 (Third Circuit).

Curb & Gutter District No. 37 of City of Fayetteville, Ark., et al. v. Parrish, 110 Fed. (2nd) 902 (Eighth Circuit).

3. The decision of the Circuit Court of Appeals in this cause ignores Rule 17 (a) of the Federal Rules of Civil Profedure.

Point B.

The facts shown by the record discloses a case of liability against J. F. Thames, Superintendent of the Penitentiary, for the wrongful death of Ray Grant, the intestate of J. E. Shoemaker, Administrator. The horrible facts and circumstances of the homicide were presented to the jury under direct and controlling principles of law, and the District Court should have been affirmed, and jurisdiction should have been sustained.

V.

ARGUMENT.

Point A.

The decision of the Court below is contrary to and in conflict with prior decisions of this Court. We respectfully call the Court's attention to the case of *Mecom v. Fitzsimmons Drilling Co., 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233, 77 A. L. R. 904*, where a full and complete discussion by this Court of the law governing the instant case is found. In that case the statute of the State of Oklahoma was substantially the same as the statute of Mississippi. The only real difference is that in Oklahoma the action was required to be brought by the administrator; whereas, in Mississippi, the action may be brought by the administrator or by the parties beneficially interested.

The majority opinion in the lower court attempted to follow the case of *Mississippi Power Co. v. Archibald, 196 So. 760.* That case involved the question of removal jurisdiction of the United States District Court and further held that an administrator was a nominal party and that his citizenship was not material in determining federal jurisdiction and is in conflict wth the federal authorities on the subject.

Mecom, Adm., v. Fitzsimmons Drilling Co., 284 U. S. 183, 52 S. Ct. 84, 76 L. Ed. 233, 77 A. L. R. 904.

Mexican Central Ry. Co. v. Eckman, 187 U. S. 429, 23 S. Ct. 211, 47 L. Ed. 245.

Bullard v. City of Cisco, 290 U. S. 179, 78 L. Ed. 254.

The opinion in the *Archibald* case was ignored and did not refer to the Federal Rules of Civil Procedure, particularly Rule 17.

Federal jurisdiction is a federal question. In the instant case jurisdiction was based on the ground of diversity of citizenship. In determination of a federal question, the United States Courts are controlled by federal statutes and decisions and are not bound by State decisions on federal jurisdiction. It goes without arguing that the Federal Courts are bound by decisions of a State Court where those decisions are substantive law. The *Archibald* case did not overrule the following Mississippi cases: *Hill v. Henderson*, 6 Sneeds & Marshall 351; *Vicksburg & M. R. Co. v. Phillips*, 64 Miss. 693, 2 So. 537; *McVey v. Illinois Cent. Railroad Co.*, 73 Miss. 487, 19 So. 209; *Wagner v. Gibbs*, 80 Miss. 53, 31 So. 434, 92 Am. St. Rep. 598; *Conklin v. Alabama & V. Railroad Co.*, 81 Miss. 152, 32 So. 920; *Mobile, J. & K. C. R. Co. v. Hicks*, 91 Miss. 273, 46 So. 360, 124 Am. St. Rep. 679; *Yazoo & M. V. R. Co. v. Jeffries, Admx.*, 99 Miss. 534, 55 So. 354; *Hamel v. So. R. Co.*, 108 Miss. 172, 66 So. 426, 809; *Newman Lumber Co. v. Scipp*, 128 Miss. 322, 91 So. 11; *Edward Hinds Yellow Pine Trustees v. Stewart*, 135 Miss. 331, 100 So. 12; *McNeely v. Natchez*, 148 Miss. 268, 114 So. 484; *Rowe v. Fair*, 157 Miss. 326, 128 So. 87; *Miss. Power & Light Co. v. Smith*, 169 Miss. 447, 153 So. 376.

The statutes in Mississippi to be applied are Sections 510, 1628 and 1712 of the Mississippi Code of 1930. These statutes are quoted in the appendix.

In the instant case, there was an allegation in the complaint of pain and suffering of the deceased prior to his death, and it was alleged that the pain and suffering were caused by the negligence of Thames. In the *Archibald*

case, there was no allegation of pain and suffering of deceased prior to his death.

The case of *Berryhill v. Nichols, 171 Miss. 769, 158 So. 470*, holds that recovery for pain and suffering is not to be had by the next of kin of a deceased or by his heirs at law, but that recovery can only be had in a suit by a personal representative. This case, though urged and cited by the administrator, was ignored by the majority opinion in the Circuit Court of Appeals.

Quoting from the dissenting opinion of the Circuit Court of Appeals in the instant case, we find as follows:

> "The duty to follow state laws, where it is owed, is so great that even dictum may tip the scales in a doubtful case, but a single utterance in the reasoning of an opinion cannot uproot principles which have been imbedded in the jurisprudence of a state by repeated uniform decisions over a long period of years. The statement in the Archibald opinion that the administrator acquired no title to the cause of action by reason of his appointment means either that he acquired no beneficial title or that the title became vested in him when he filed suit, not upon his appointment. The term cause of action may mean one thing for one purpose and something different for another. United States v. Memphis Cotton Oil Co., 288 U. S. 62, 67, 68, 53 S. Ct. 278, 77 L. Ed. 619. The term may refer to the facts giving rise to the action or to the right to institute and carry on the action. Grenada Bank v. Petty, 174 Miss. 415, 164 So. 316. The former is substantive, the latter is remedial. Douglas v. Daniels Bros. Coal Co., 135 Ohio St. 641, 22 N. E. 2d. 195, 125 A. L. R. 761, 766. *In the Archibald opinion, I think the court used the term in its substantive sense.* It did not mean that the administrator had no remedial right of action." (Italics ours).

We respectfully call the Court's attention to the recent case decided by the United States Supreme Court on April 28, 1941, No. 727 and styled *"The Shamrock Oil & Gas Corp. v. G. Obie Sheets and Chester Sheets, doing business as Friona Independent Oil Co."*, wherein it was said:

> "But at the outset it is to be noted that decision turns on the meaning of the removal statute and *not upon the characterization* of the suit or the parties to it *by state statutes or decisions.* Mason City & Ft. Dodge Ry. Co. v. Boynton, 204 U. S. 570. The removal statute which is nationwide in its operation, was intended to be uniform in its application, *unaffected by local law definition or characterization* of the subject matter to which it is to be applied. *Hence the Act of Congress* must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts. Cf. Hammel v. Burnet, 287 U. S. 103, 110." (Italics ours).

While the above quotation was with reference to the removal jurisdiction, the same doctrine was applicable in the instant case where the question was one of original jurisdiction. See also: *Kloeb v. Armour & Company*, 85 Adv. Op. 156, 61 S. Ct. Rep. 213, U. S. Law Week, p. 4065, (No. 65) decided December 9, 1940.

The case of *Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 118*, and cases following it have no application to the questions involved in the instant case for the reason that the questions in the instant case are governed by state law, and the right of the administrator to bring the suit arose out of Sections 510, 673, 674, 1628 and 1712 of the Mississippi Code of 1930. (These sections of the Mississippi Code are found in the appendix).

The primary question arose out of said Section 510. Before the *Erie Railroad* case was decided, state statutes as construed by state decisions were binding upon the state courts. Therefore, in the instant case, all questions of substantive law of either tort or contract were governed by state statutes and decisions, but if the state created a cause of action and empowered an administrator to sue thereon in a state court, it could not deny that right in the Federal Court nor lay down a new doctrine with reference to whose citizenship is determinative of federal jurisdiction.

Point B.

The majority opinion in the Circuit Court of Appeals below indicated that the opinion of the District Court was most persuasive and did not pass on the cause or its merits and erred in not affirming the action of the District Court and in not considering the cause on its merits and refusing to sustain jurisdiction.

Conclusion.

It is therefore respectfully submitted that the Circuit Court of Appeals erred in reversing and remanding the cause to the District Court and erred in not affirming the judgment of the District Court. It was unequivocably shown that there was diversity of citizenship between the plaintiff and the defendants.

This is a case, therefore, that we respectfully submit calls for the exercise by this Court of its supervisory powers in order that the law may be settled finally wherein confusion exists between the Fifth Circuit and the United States Supreme Court and where confusion exists between

the Fifth Circuit and all other Circuits that have passed on the question herein involved, and in order that the errors complained of herein may be corrected, that a writ of certiorari should be granted and this Court should review the opinion of the United States Circuit Court of Appeals for the Fifth Circuit and reverse the decision of the United States Circuit Court of Appeals for the Fifth Circuit and affirm the judgment of the District Court.

Respectfully,

R. W. THOMPSON, JR.,
WEBB M. MIZE,
FRANK F. MIZE,
Counsel for Petitioner.

By_____

APPENDIX.

Mississippi Code of 1930, Section 510, Actions for injuries producing death.—Whenever the death of any person shall be caused by any real wrongful or negligent act, or omission, or by such unsafe machinery, way or appliances as would, if death had not ensued, have entitled the party injured, or damaged thereby to maintain an action and recover damages in respect thereof, and such deceased persons shall have left a widow or children, or both, or husband, or father, or mother, or sister, or brother, the person or corporation, or both that would have been liable if death had not ensued, and the representatives of such person shall be liable for damages, notwithstanding the death, and the fact that death was instantaneous shall, in no case affect the right of recovery. The action for such damages may be brought in the name of the personal representative of the deceased person, for the benefit of all persons entitled under the law to recover or by widow, for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child, or in the name of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits. In such action the party or parties suing shall recover such damages as the jury may determine to be just, taking into consideration all the damages

of every kind to the decedent and all damages of every kind to any and all parties interested in the suit.

This section shall apply to all personal injuries of servants and employees received in the service of business of the master or employer, where such injuries result in death. Damages recovered under the provisions of this section shall not be subject to the payment of the debts or liabilities of the deceased, except as hereinafter provided, and such damages shall be distributed as follows:

Damages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children all shall go to his wife; damages for the injury and death of a married woman shall be equally distributed to the husband and children, and if she has no children all shall go to the husband; and if the deceased has no husband or wife the damages shall be equally distributed to the children; if the deceased has no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brothers and sisters, or such of them as the deceased may have living at his or her death. If the deceased have neither husband, or wife, or children, or father, or mother, or sister, or brother, then the damages shall go to the legal repesentative, subject to debts and general distribution, and the fact that the deceased was instantly killed shall not affect the right of the legal representative to recover. The provisions of this section shall apply to illegitimate children on account of the death of the mother and to the mother on account of the death of an illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates.

If the deceased be illegitimate and shall leave neither mother, child nor lawful heirs, then all the provisions of this section shall extend and apply to the legal representatives, and the other natural blood relatives of deceased the same as if they were his legitimate relatives and heirs, excepting his father and father's relatives, unless they be full brothers or sisters of deceased, or their heirs.

Mississippi Code of 1930, Section 673, Executors and administrators entitled to and liable for costs.—Executors and administrators shall be entitled to and answerable for costs in the same manner as the testator or intestate would have been, and shall be allowed for the same in their accounts, if the court awarding costs against them shall certify that there were probable grounds for instituting, prosecuting, or defending the action on which the judgment or decree shall have been given against them or in which the costs for which they are liable shall have accrued.

Mississippi Code of 1930, Section 674, Executors and administrators entitled to and liable for costs—when not individually liable.—When costs are adjudged against an executor or administrator in a suit at law or in equity, and he shall obtain the certificate of the court before which the suit was tried that there was probable cause for bringing or defending the same, he shall not be individually liable for costs, although the estate may be insufficient to pay them.

Mississippi Code of 1930, Section 1628, Administrator to institute suits.—If necessary, an administrator may be appointed to institute and conduct suits, whose power shall

cease when the litigation is entirely closed, and who shall only account for the proceeds of the suit.

Mississippi Code of 1930, section 1712, Remedies; what actions survive to executor.—Executors, administrators, and temporary administrators may commence and prosecute any personal action whatever, at law or in equity, which the testator or intestate might have commenced and prosecuted. And they shall also be liable to be sued in any court in any personal action which might have been maintained against the deceased.

21

Office - Supreme Court, U. S.
FILED
JUN 26 1941
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. [redacted] 106

STATE OF MISSISSIPPI FOR THE USE AND BENEFIT OF J. E. SHOEMAKER, ADMINISTRATOR OF THE ESTATE OF RAY GRANT, DECEASED, PETITIONER,

VS.

J. F. THAMES AND UNITED STATES FIDELITY & GUARANTY COMPANY, RESPONDENTS.

RESPONSE OF J. F. THAMES AND UNITED STATES FIDELITY & GUARANTY COMPANY TO PETITION FOR WRIT OF CERTIORARI OF STATE OF MISSISSIPPI FOR USE AND BENEFIT OF J. E. SHOEMAKER, ADMINISTRATOR OF THE ESTATE OF RAY GRANT, DECEASED.

WILLIAM H. WATKINS,
Jackson, Mississippi,
GEORGE BUTLER,
Jackson, Mississippi,
CHARLES B. SNOW,
Jackson, Mississippi,
Attorneys for Respondents.

INDEX

Statement of the Case 1

Brief and Argument 3

Conclusion 19

Appendix A 21

Appendix B 23

Cases Cited

Alton Railroad Company vs. Illinois Commerce Commission, 305 U. S. 548, 83 L. Ed. 344 7

Bauserman vs. Blunt, 147 U. S. 647, 37 L. Ed. 316 6

Belzoni Lbr. Co. vs. Cinquimani, 137 Miss. 72, 102 So. 470 19

Berryhill vs. Nichols, 171 Miss. 769, 158 So. 470 ..... 17, 18

Bingaman vs. Golden Eagle Lines, 297 U. S. 626, 80 L. Ed. 928 7

Borax Consolidated, Ltd., et al., vs. City of Los Angeles, 296 U. S. 10, 80 L. Ed. 9 7

Brown vs. Strode, 5 Cranch 303, 3 L. Ed. 108 9

Bullard vs. City of Cisco, 290 U. S. 179, 78 L. Ed. 254 ..... 13, 14

Chambers et al. vs. Anderson, 58 F. 2d 151 (Sixth Circuit) 14

City of Detroit vs. Blanchfield, 13 F. 2d 13 (Sixth Circuit) 12

City of New Orleans vs. Whitney, 138 U. S. 595, 34 L. Ed. 1102 13

Continental Life Insurance Co. vs. Rhoades, 119 U. S. 237, 30 L. Ed. 380 14

Coverdale vs. Arkansas-Louisiana Pipe Line Company, 303 U. S. 604, 736, 82 L. Ed. 1042 7

Cumberland Tel. & Tel. Co. vs. Anderson, 89 Miss. 732, 41 So. 263 19

Curb & Gutter District No. 37 vs. Parrish, 110 F. 2d 902 (Eighth Circuit) 14

Erie Railroad Co. vs. Tompkin, 304 U. S. 64, 82 L. Ed. 1118 7
Farncomb vs. Denver, 252 U. S. 7, 64 L. Ed. 424 6
Fidelity Union Trust Co. vs. Field, 311 U. S. 169, 85 L. Ed. 176 ..... 7, 10
Graham vs. White Phillips Co., 296 U. S. 27, 80 L. Ed. 20 7
Guarantee Trust Co. vs. Collings et al., 76 F. 2d 870 (Third Circuit) 14
Gulf, etc., Railroad Company vs. Simmons, 144 Miss. 350, 109 So. 857 5
Hamel vs. Railroad, 108 Miss. 172, 66 So. 426, 809 19
Hess vs. Reynolds, 113 U. S. 73, 28 L. Ed. 927 12
Huff vs. Hutchinson, 14 How. 586, 14 L. Ed. 553 10
Irvine vs. Lowry, 14 Pet. 293, 10 L. Ed. 462 9
J. Bacon & Sons vs. Martin, 305 U. S. 548, 83 L. Ed. 233 7
Kirkpatrick vs. Ferguson-Palmer Company, 116 Miss. 874, 77 So. 803 5
Kloeb vs. Armour & Co., 85 L. Ed. 156 17
Lauf vs. Shinner, 303 U. S. 323, 82 L. Ed. 872 7
McLean vs. State of Mississippi for Use Roy, (Fifth Circuit) 96 F. 2d 741, certiorari denied 305 U. S. 623, 83 L. Ed. 399 9
McNutt vs. Bland, 2 How. 9, 11 L. Ed. 159 9
Mecon vs. Fitzsimmons Drilling Co., 284 U. S. 183, 76 L. Ed. 233 ..... 11, 12
Memphis Street Railway Co. vs. Moore, 243 U. S. 299, 61 L. Ed. 733 ..... 6, 13, 14
Mexican Central R. R. Co. vs. Eckman, 187 U. S. 429, 47 L. Ed. 245 12
Mississippi Power Company vs. Archibald, 189 Miss. 332, 196 So. 760 ..... 7, 10, 11, 17, 19
Moore vs. I. C. R. R. Co., 85 L. Ed. 722 10
Munday vs. Wisconsin Trust Co., 252 U. S. 499, 64 L. Ed. 684 7
Murry vs. Cotton, 169 Miss. 521, 152 So. 657 19
New York Evening Post vs. Chaloner, (Second Circuit) 256 Fed. 204 9

Payne vs. Hook, 7 Wall. 425, 19 L. Ed. 260 14
Rice vs. Houston, 13 Wall. 66, 20 L. Ed. 484 14
Schuykill Trust Company vs. Commonwealth of Pennsylvania, 302 U. S. 506, 82 L. Ed. 392 7
Shamrock Oil & Gas Corp. vs. Sheets, 85 L. Ed. 836 17
Six Companies vs. Joint Highway District, 85 L. Ed. 159 7
State of Md. vs. Baldwin, 112 U. S. 490, 28 L. Ed. 822 10
State vs. Stanton, 39 L. Ed. 243, 155 U. S. 513 10
Susquehanna & Wyoming Valley R. R. & Coal Co. vs. Blatchford, 11 Wall. 172, 20 L. Ed. 179 13
Thames et al. vs. State of Mississippi for Use, etc., 117 F. 2d 949 2
Thompson vs. The Central Ohio R. R. Co., 73 U. S. (6 Wall.) 134, 18 L. Ed. 756 7
Turk vs. I. C. R. R., (Sixth Circuit) 218 Fed. 315 7
United States vs. Sherwood, 85 L. Ed. 696 16
West vs. American Telephone & Telegraph Co., 311 U. S. 223, 85 L. Ed. 146 7

STATUTES

Federal Rules of Civil Procedure, Rule (a) 16
Mississippi Code, 1857, Chapter 61, Article 48 5
Mississippi Code, 1930, Section 510 ..... 4, 5, 6, 8, 17, 18, 19
Mississippi Code, 1930, Sections 673, 674, 1628 and 1712 19
United States Code Annotated, Title 28, Section 41 5
United States Code Annotated, Title 28, Sections 71, 80 6

Supreme Court of the United States

No. 1085.

STATE OF MISSISSIPPI FOR THE USE AND BENEFIT OF J. E. SHOEMAKER, ADMINISTRATOR OF THE ESTATE OF RAY GRANT, DECEASED, PETITIONER,

VS.

J. F. THAMES AND UNITED STATES FIDELITY & GUARANTY COMPANY, RESPONDENTS.

RESPONSE OF J. F. THAMES AND UNITED STATES FIDELITY & GUARANTY COMPANY TO PETITION FOR WRIT OF CERTIORARI OF STATE OF MISSISSIPPI FOR USE AND BENEFIT OF J. E. SHOEMAKER, ADMINISTRATOR OF THE ESTATE OF RAY GRANT, DECEASED.

STATEMENT OF THE CASE.

We believe a fuller statement of the case than appears in the petition advisable in the interest of clarity.

Respondent Thames was the superintendent of the Mississippi State Penitentiary. Respondent, United States Fidelity & Guaranty Company, was the surety on his official bond. In March, 1938, Ray Grant was killed in a roadhouse brawl by a trusty convict, an inmate of the

state penitentiary, near the city of Jackson, in the State of Mississippi. The trusty convict had accompanied the superintendent to Jackson, acting as his chauffeur, and instead of repairing to the hotel where arrangement had been made for his lodging, as directed by the superintendent, the convict fell in with evil companions and visited the roadhouse where a fight occurred resulting in the death of Ray Grant at the hands of the trusty convict.

This suit originated in the District Court of the United States for the Jackson Division of the Southern District of Mississippi and thereby damages are sought to be recovered of Thames, the superintendent, and his official surety on account of the alleged wrongful death of Ray Grant, for the benefit of the father, mother and brother of decedent, the beneficiaries designated as entitled to recover for wrongful death under the statute of the State of Mississippi.

A trial was had of the cause in the district court resulting in a judgment against both respondents in the amount of $20,000 (Tr. p. 218).

Motion for a new trial was seasonably entered and overruled (Tr. p. 240).

Appeal by respondents was had to the Circuit Court of Appeals for the Fifth Circuit, and error was assigned attacking the propriety of the judgment on the merits, as well as the jurisdiction of the district court.

The circuit court of appeals found the question of jurisdiction controlling and, accordingly, did not consider the case on the merits; held the district court without jurisdiction; and ordered the judgment of the district court reversed, the cause remanded with directions to vacate the judgment and dismiss the complaint for want of jurisdiction. *Thames et al.* v. *State of Mississippi for Use, etc.*, 117 F. 2d 949 (Tr. p. 251, *et seq.*).

BRIEF AND ARGUMENT.

Since the circuit court of appeals found the question of jurisdiction controlling and held the district court without jurisdiction and, accordingly, did not consider the case on the merits, it is assumed that this is the sole question to be considered on this petition.

Respondents respectfully submit that the circuit court of appeals rightly decided that the district court was without jurisdiction in this cause and that, accordingly, the judgment of the court of appeals is correct.

The jurisdiction of the district court was invoked solely on the ground of diversity of citizenship and amount involved. The amount involved is within the jurisdiction of the district court but the suit is not wholly between citizens of different states and, accordingly, is not within the jurisdiction of the district court.

The suit is in the name of the State of Mississippi, nominally for the use of Shoemaker, the administrator of the estate of Ray Grant, deceased, against Thames, the superintendent of the Mississippi State Penitentiary, and the United States Fidelity & Guaranty Company, the surety on his official bond, for the alleged wrongful death of Ray Grant, deceased. However, by virtue of the Mississippi statute, said suit is actually for the use and benefit of the surviving father, mother and brother of said decedent and, in fact, said surviving father, mother and brother of decedent are the real usees.

The jurisdictional question was raised in the district court first by motion to dismiss and accompanying affidavit (Tr. pp. 16-18, inclusive). This motion was overruled (Tr. p. 19). Also, as the second defense in the answer of the respondent Thames (Tr. pp. 20-21).

The jurisdictional question was again raised by motion of the respondents to set aside the judgment of the

district court and to render or grant a new trial (Tr. pp. 223-232, inclusive). This motion was overruled (Tr. pp. 240-241, inclusive).

The record discloses and the fact is that Shoemaker, the administrator, the nominal usee in the complaint, was and is a resident and citizen of the State of Louisiana. The record discloses and the fact is that respondent Thames was and is a resident and citizen of the State of Mississippi, and the respondent guaranty company, a corporation, a resident and citizen of the State of Maryland.

As above set forth, the suit is for the alleged wrongful death of Ray Grant, deceased. By virtue of the Mississippi statute under which the suit is brought, Section 510, Mississippi Code of 1930, the suit is for the use and benefit of the surviving father, mother and brother of decedent. The record discloses and the fact is that at the time of his death said decedent, Ray Grant, had a fixed place of residence in the First District of Hinds County, in the State of Mississippi, and that the father, mother and brother of decedent were and are likewise residents of the First District of Hinds County, Mississippi (see motion to dismiss and affidavit, Tr. pp. 16-17, inclusive, and sworn petition for letters of administration on the estate of Ray Grant, deceased, in the Chancery Court of the First District of Hinds County, Mississippi, Tr. pp. 226-229, inclusive).

It will be noted from the petition for letters of administration that the sole purpose of the appointment of the administrator was that the name of the administrator appear as the nominal usee in the suit now before the court for the alleged wrongful death of the deceased, Ray Grant.

The question of jurisdiction, therefore, is that in this particular suit brought under the Mississippi statute, the status of Shoemaker, the administrator, is, under the Mississippi statute as construed by the Supreme Court of the

State of Mississippi, a mere nominal or formal plaintiff or usee, and the real usees are the father, mother and brother of the decedent, all residents of the State of Mississippi, and since the respondent Thames, defendant in the district court, was and is likewise a resident of the State of Mississippi, there is no diversity of citizenship and the suit is not wholly between citizens of different states, as contemplated by Title 28, Section 41, United States Code Annotated.

A suit for damages for wrongful death, such as this is, is authorized by and is brought under Section 510 of the Mississippi Code of 1930, the Mississippi wrongful death statute (for statute in full see Appendix "A").

It will be noted that said statute specifically enumerates those for whose benefit a recovery for a wrongful death may be had and provides that there shall be but one suit, which shall "ensue" for the benefit of all the parties so enumerated.

But for the Mississippi statute, Section 510, Mississippi Code of 1930, there would be no right of action for the benefit of any person for damages on account of the death of Ray Grant, deceased.

Kirkpatrick v. *Ferguson-Palmer Company*, 116 Miss. 874, 77 So. 803.

Gulf, etc., Railroad Company v. *Simmons*, 144 Miss. 350, 109 So. 857.

The Mississippi wrongful death statute, which now appears as Section 510 of the Mississippi Code of 1930, is a revised edition of Lord Campbell's Act. The original act in this state first appeared as Chapter 61, Article 48, page 486, Mississippi Code of 1857. Prior to the passage of that statute, a cause of action for wrongful death in this state died with the injured party.

So, the plaintiffs in the district court necessarily resorted to said Section 510 of the Mississippi Code in order to maintain this action, and the rights and status of any party in a suit for wrongful death occurring in this state

are as fixed by said section of the Mississippi Code and as the same has been construed by the Supreme Court of the State of Mississippi.

There can be no question but that the federal courts determine their own jurisdiction and in so doing follow the decisions of the federal courts. Respondents recognize this. The circuit court of appeals recognized this in its opinion in this case. The federal jurisprudence is established, however, to the effect that the residence and citizenship of a mere nominal or formal party is not controlling to establish diversity of citizenship, but the court will look to the residence and citizenship of the real parties in interest. See cases cited Notes 351, 352 and 353, United States Code Annotated, Title 28, Section 71, and Notes 20-26, inclusive, Title 28, Section 80.

So, the question which the circuit court of appeals was called upon to determine, and the question which it did determine, is the status in this particular suit of Shoemaker, the personal representative whose name is used in the suit.

The personal representative whose name is used was appointed under the laws of the State of Mississippi to bring a suit for wrongful death under said Section 510. The suit has been brought under said Section 510. Without said Section 510 of the Mississippi Code, no such cause of action exists.

The status of the personal representative in this suit is, therefore, such as is fixed by said Section 510 as the same has been construed by the Supreme Court of the State of Mississippi.

In determining this question the court of appeals was bound by the interpretation given the state statute by the Supreme Court of the State of Mississippi, and the interpretation thereof by the Supreme Court of the State forms just as much a part of the statute as if literally written therein by the legislature itself. *Bauserman* v. *Blunt,* 147 U. S. 647, 37 L. Ed. 316; *Memphis Street Railway Co.* v. *Moore,* 243 U. S. 299, 61 L. Ed. 733; *Farncomb*

v. *Denver*, 252 U. S. 7, 64 L. Ed. 424; *Munday* v. *Wisconsin Trust Co.*, 252 U. S. 499, 64 L. Ed. 684; *Erie Railroad Co.* v. *Tompkin*, 304 U. S. 64, 82 L. Ed. 1118; *Borax Consolidated, Ltd., et al.*, v. *City of Los Angeles*, 296 U. S. 10, 80 L. Ed. 9; *Bingaman* v. *Golden Eagle Lines*, 297 U. S. 626, 80 L. Ed. 928; *Graham* v. *White Phillips Co.*, 296 U. S. 27, 80 L. Ed. 20; *Lauf* v. *Shinner*, 303 U. S. 323, 82 L. Ed. 872; *Schuykill Trust Company* v. *Commonwealth of Pennsylvania*, 302 U. S. 506, 82 L. Ed. 392; *Coverdale* v. *Arkansas-Louisiana Pipe Line Company*, 303 U. S. 604, 736, 82 L. Ed. 1043; *J. Bacon & Sons* v. *Martin*, 305 U. S. 380, 83 L. Ed. 233; *Alton Railroad Company* v. *Illinois Commerce Commission*, 305 U. S. 548, 83 L. Ed. 344; *West* v. *American Telephone & Telegraph Co.*, 311 U. S. 223, 85 L. Ed. 146; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 85 L. Ed. 176; *Six Companies* v. *Joint Highway District*, 85 L. Ed. 159, No. 267, this term. Also, see, *Thompson* v. *The Central Ohio R. R. Co.*, 73 U. S. (6 Wall.) 134, 18 L. Ed. 765; and *Turk* v. *I. C. R. R.*, (Sixth Circuit) 218 Fed. 315.

In determining that the status of the personal representative in this suit is that of a mere formal or nominal party having no interest whatever in the suit, and that the real usees were the father, mother and brother of the decedent, residents of the State of Mississippi, the circuit court of appeals followed the provisions of the Mississippi statute as construed by the Mississippi Supreme Court in the very recent case of *Mississippi Power Company* v. *Archibald*, decided by the Mississippi Supreme Court June 10, 1940, and reported 189 Miss. 332, 196 So. 760 (for full text of opinion see Appendix "B").

The decision of the Supreme Court of the State of Mississippi in the Archibald case construing its own statute is the last pronouncement of the Supreme Court of this State in connection with the statute. The decision has been in no way modified, but suggestion of error was overruled therein on September 4, 1940 (see Official Report, 189 Miss. 322).

In construing the statute and determining the status of a personal representative in a suit thereunder, the Supreme Court of the State of Mississippi announced the following conclusions:

Under Section 510 damages for wrongful death shall be equally distributed to the designated surviving beneficiaries, in this instance, the father, mother and brother.

The suit to recover such damages *may* be brought *in the name of* the personal representative *for the benefit of the persons designated.*

The personal representative is not a necessary party where any of the persons entitled under the law survive the deceased.

The personal representative *is not entitled, in behalf of the estate,* to any part of the recovery.

Any recovery had goes to the designated beneficiaries and does not go to the payment of any of the debts of the estate.

The personal representative *cannot administer any funds so derived as an asset of the estate* so as to be entitled to commissions thereon as part of his compensation as an administrator.

The right of action is the right of action of the designated beneficiaries, and *they may sue* therefor *in their own name* or *may, in their discretion, sue in the name of the personal representative,* but in either event all damages recovered accrue to them, "and to them alone."

In such a suit the personal representative *is a mere formal party.*

He has no more interest in the litigation, *so far as the estate is concerned,* than a next friend would have.

No title to damages recoverable ever vests in the personal representative under the Mississippi statute when, as here, designated beneficiaries survive.

Unless asked *to lend his name as a nominal plaintiff,* the suit is of no concern to him.

If *the name* of the personal representative is used, *the estate* is neither benefited by a recovery nor adversely affected by a failure to recover.

The real actors are the designated beneficiaries.

The Supreme Court of Mississippi in its opinion in the Archibald case recognized the general rule that ordinarily the residence of the administrator controls on the issue of diversity of citizenship, but very aptly pointed out that this rule is based upon the fact that the administrator has the legal title to the cause of action involved by virtue of his appointment. The Mississippi court further recognized that if the personal representative had any title to the recovery sought, his residence would control.

However, under the Mississippi statute, the statute involved here, as construed by the Supreme Court of Mississippi, no title to damages recoverable ever vests in the personal representative where, as here, designated beneficiaries survive.

Under the Mississippi statute, as construed by the Mississippi court, the personal representative in this suit has the same status as if he were suing as next friend for the use and benefit of the real parties at interest.

It is proper to interpret the decision of the Supreme Court of Mississippi by the rule announced in the cases cited. The court cites *McNutt* v. *Bland,* 2 How. 9, 11 L. Ed. 159; *New York Evening Post* v. *Chaloner,* (Second Circuit) 265 Fed. 204; *Irvine* v. *Lowry,* 14 Pet. 293, 10 L. Ed. 462. In each of these cases the rule is announced that where a nominal party sued for the use and benefit of another person, the residence of the plaintiff is to be determined not by the residence of the nominal plaintiff, but by that of the real parties at interest. A typical case is *McNutt* v. *Bland, supra.*

In *McLean* v. *State of Mississippi for Use Roy,* (Fifth Circuit) 96 F. 2d 741, certiorari denied 305 U. S. 623, 83 L. Ed. 399, the court reannounced the same rule. Other cases are: *Brown* v. *Strode,* 5 Cranch 303, 3 L. Ed. 108;

Huff v. *Hutchinson,* 14 How. 586, 14 L. Ed. 553; *State of Md.* v. *Baldwin,* 112 U. S. 490, 28 L. Ed. 822; *State* v. *Stanton,* 39 L. Ed. 243, 155 U. S. 513.

The Mississippi legislature created the right to sue for wrongful death. Certainly it was within the power of the Mississippi legislature to confer that right in whom it saw fit. It might have conferred the right in the widow exclusively; in the children exclusively; in the father and mother and brothers and sisters exclusively. Or it might have conferred the right in the beneficiaries, as it has, to sue in the name of the personal representative. For a long time it did not so see fit. The Mississippi wrongful death statute existed from its original enactment in 1857 until 1914 without such rigtht in the beneficiaries to sue in the name of the personal representative. When it did confer the right to bring the suit in the name of the personal representative for the benefit of other persons, it might condition that right. It did condition the right. When the Mississippi legislature conferred the right upon the beneficiaries to bring a suit for wrongful death in the name of the personal representative of the deceased, it made of such personal representative in such a suit a mere formal or nominal party comparable to a next friend: a mere conduit, a mere stakeholder, a mere figurehead.

The status of the personal representative in such a suit is fixed by the statute as construed by the Supreme Court of Mississippi in the *Archibald Case, supra.* Whether wrong or right, the Archibald case is written into the Mississippi statute. The Mississippi court might change it, but no other court has such authority. See *Moore* v. *I. C. R. R. Co.,* 85 L. Ed. 722, No. 550, October, 1940, term; *Fidelity Union Trust Company* v. *Field, supra.*

There is a vast difference between a suit of this character and a suit by a general administrator of a decedent suing for the collection of assets which belong to the estate. In the latter instance, he has by operation of law

Also, Klaxon Co. v. Stantor Elec. Mfg. Co. No. 741, decided June 2, 1941.

been vested with the legal title to all of the assets of the estate, while, in the former instance, he is vested with no title at all. The cases cited by petitioner with which it is asserted the decision of the circuit court of appeals in this case is in conflict are distinguishable from the instant case in this regard. Here the personal representative has no title whatever to the proceeds of the suit. The recovery sought is in no sense an asset of the estate. He merely acts as a conduit, with rights, powers and status as fixed by the Mississippi statute as construed by the Mississippi court in the *Archibald Case, supra.*

The decision of the court of appeals is not in conflict with any decision of the Supreme Court of the United States or with any decision of any court of appeals. The only decision with which it would be possible for the opinion of the court of appeals in this case to conflict would be a decision fixing the status of a personal representative suing for wrongful death under the Mississippi wrongful death statute as construed by the Mississippi Supreme Court. There is in existence but one such decision and that is in the case of *Mississippi Power Company* v. *Archibald, supra,* which the circuit court of appeals in its opinion here has followed.

We shall briefly discuss the cases cited by petitioner and asserted as in conflict with the decision of the circuit court of appeals in the case at bar.

The opinion of the court of appeals in this case is in no sense in conflict with *Mecon* v. *Fitzsimmons Drilling Co.*, 284 U. S. 183, 76 L. Ed. 233. There Oklahoma statutes *as construed by the Oklahoma court were under review.* Here a Mississippi statute *as construed by the Mississippi court is under review.*

The court in the Mecon case was clearly looking to the Oklahoma statutes as construed by the Oklahoma court, saying:

> "The applicable statutes make the administrator the trustee of an express trust and require the suit to be brought and controlled by him."

Such is certainly not the case under the Mississippi statute as construed by the Mississippi court in the Archibald case.

Mexican Central R. R. Co. v. *Eckman,* 187 U. S. 429, 47 L. Ed. 245. The Eckman case is cited by the court in the opinion in the *Mecon Case, supra.* This decision supports the decision in the Mecon case, but is not in conflict with the decision here. That case involves a suit by a general guardian to recover damages inuring to his ward. The title to the damages inured to the guardian for the benefit of the estate of the ward. In the instant case, the estate acquires no title whatever to the damages sought to be recovered and receives no benefit whatever therefrom. The court in the Eckman case recognized the general rule here involved that the residence of a mere nominal or formal party, a mere conduit or next friend, is not controlling.

Likewise, *City of Detroit* v. *Blanchfield,* 13 F. 2d 13 (Sixth Circuit), another case referred to in the opinion in the *Mecon Case, supra.* Here there was involved a Michigan statute and the Court of Appeals for the Sixth Circuit properly followed *Mexican Railway* v. *Eckman, supra.* This case is quite similar to the Eckman case and, while the same is authority in the Mecon case, it is not in conflict with the decision of the Court of Appeals in the present case.

In *Hess* v. *Reynolds,* 113 U. S. 73, 28 L. Ed. 927, the suit was against a general administrator under the laws of Michigan by a creditor to collect a debt due by deceased and from the assets of the estate, legal title to which was vested in the administrator.

And, likewise, *City of New Orleans* v. *Whitney,* 138 U. S. 595, 34 L. Ed. 1102, involving Louisiana law. There an administrator was sued to collect an asset belonging to the estate.

And in *Bullard* v. *City of Cisco,* 290 U. S. 179, 78 L. Ed. 254, the court held that the trustees in whose names the suit was brought were the actual owners of the funds involved, and, therefore, the citizenship of the trustees was controlling, but apparently recognized that if the trustees were not the owners, but sued for the use and benefit of others, the residence of the real owners would control.

And *Memphis Street Railway Company* v. *Moore, Administrator,* 243 U. S. 299, 61 L. Ed. 733. We consider this case in accord with the holding of the court of appeals in the instant case, and in fact authority therefor. This was a suit by an administrator in a federal court in the State of Tennessee, apparently under the Tennessee death statute. There was in force a statute of the State of Tennessee providing that when a nonresident of the state qualified in the state as administrator, for the purpose of suing and being sued, he should be treated as a citizen of Tennessee.

The Supreme Court of the State of Tennessee had previously held that the sole purpose of the act was to extend to such nonresident administrator the privilege of suing in the state courts *in forma pauperis.* This court held that, in determining the residence of the administrator, it was bound by the construction of the Tennessee statute as construed by the Tennessee Supreme Court.

In *Susquehanna & Wyoming Valley R. R. & Coal Co.* v. *Blatchford,* 11 Wall. 172, 20 L. Ed. 179, there was involved a suit by trustees in a mortgage. In holding that the residence of the trustees was controlling, the court said:

"In the case at bar the plaintiffs are the real prosecutors of the suit. They are parties to the mortgage contract negotiating its terms and stipulations, and to them the usual rights and powers of mortgagees are reserved, and to them the usual obligations of mortgagors are made."

Thus, this is clearly the distinguishing feature of this case from the case at bar.

Continental Life Insurance Co. v. *Rhoades*, 119 U. S. 237, 30 L. Ed. 380, also cited by petitioner. The facts are not discussed in the court's opinion and the opinion is based upon the fact that the residence of the parties did not appear from the record.

Rice v. *Houston*, 13 Wall. 66, 20 L. Ed. 484, is a case where a general administrator under the laws of the State of Tennessee brought suit to collect assets belonging to the estate.

Payne v. *Hook*, 7 Wall. 425, 19 L. Ed. 260, simply recognized the right of a distributee of an estate in the State of Missouri to bring a suit in the Federal Court against an administrator for his distributive share of the estate.

Chambers et al. v. *Anderson*, 58 F. 2d 151 (Sixth Circuit), followed *Memphis Street Railway Company* v. *Moore*, *supra*, and involved a Tennessee statute.

Guarantee Trust Co. v. *Collings et al.*, 76 F. 2d 870 (Third Circuit), seems to be a case similar to *Bullard* v. *City of Cisco*, *supra*, as the court quoted therefrom that portion of the opinion wherein it was stated that the transfer to the trustee vested them with the full title to the bonds in question.

Curb & Gutter District No. 37 v. *Parrish*, 110 F. 2d 902 (Eighth Circuit), likewise cited by petitioner, in-

volved a suit by a trustee of an express trust and his citizenship was, of course, controlling.

We have briefly discussed the cases referred to by petitioner with which it is asserted the decision of the circuit court of appeals in this case is in conflict in order to point out that in each case cited the party whose citizenship was recognized by the court as controlling had the legal title to or an interest in the recovery sought, either by operation of law or otherwise. To this controlling extent, these cases are distinguishable from and are not in conflict with the opinion of the court of appeals in the instant case. Here, under the Mississippi statute involved as construed by the Mississippi Supreme Court, which construction is binding, the personal representative has no title to or interest in the recovery sought. His status is that he has no more interest in the litigation than a next friend would have. Here the personal representative is not entitled in behalf of the estate of deceased to any part of the recovery. No title to the damages sought to be recovered ever exists in the personal representative. This is what the Mississippi statute under which this suit is brought, as construed by the Mississippi Court, says in regard to the status of the personal representative in this suit.

Because in the complaint the nominal plaintiff is referred to as the administrator clothes him with no magic. His name is used in a statutory cause of action by permission of the Mississippi legislature only. His status therein is necessarily such as is fixed by the Mississippi statute by which the cause of action is created and by which the permissive right to use his name is granted. The Mississippi statute as construed by the Mississippi court clearly fixes his status.

The status of the personal representative here is identical with the status of the State of Mississippi in this suit. The State of Mississippi brings the suit nominally for the use and benefit of Shoemaker administrator,

and actually his status in this suit is for the use and benefit of the father, mother and brother of deceased.

Petitioner asserts that the decision of the circuit court of appeals in this case ignores Rule 17 (a) of the Federal Rules of Civil Procedure.

Rule 17 (a) of the Federal Rules of Civil Procedure is not involved in this case. The question involved is one of jurisdiction presenting the question of diversity of citizenship. It is well settled that the Rules of Civil Procedure neither enlarge nor abridge the jurisdiction of federal courts. See the case of *United States* v. *Sherwood*, decided March 31, 1941, 85 L. Ed. 696, No. 500. The rule contains the following language:

> "* * * but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States."

There is nothing new in the provision. It merely crystallizes a well-established rule of federal practice as appears from the foregoing authority. The rule, however, in no manner dispenses with the necessity for diversity of citizenship. The rule cannot enlarge or abridge or effect in any manner the necessity for diversity of citizenship. Where a person sues for the use and benefit of another person he may sue alone without joining the beneficiary, but the rule is that the diversity of citizenship is to be determined by the residence of the beneficiaries and not the nominal plaintiff. There is nothing in the foregoing rule to change the law in that respect. In fact, the rule is but an announcement of an established practice. As appears from Note (a), the rule is taken

from Equity Rule 37 except as to the very last clause which is not involved here.

Petitioner mentions the case of *Shamrock Oil & Gas Corp.* v. *Sheets*, 85 L. Ed. 836, No. 727, decided by this court on April 28, 1941, and, also, *Kloeb* v. *Armour & Co.*, 85 L. Ed. 156, No. 65, decided December 9, 1940. It is apparent that these cases have no application whatsoever to the case at bar.

Petitioner has referred to a number of Mississippi cases, stating that the case of *Mississippi Power Company* v. *Archibald, supra*, did not overrule these cases. This is true. Neither is there anything in the decision in the Archibald case in conflict with the decision of the Mississippi court in the cases cited. In any event, the Archibald case is the only case in which the Mississippi court has undertaken to analyze the status of a personal representative in a suit under Section 510 of the Mississippi Code of 1930, the Mississippi wrongful death statute. Likewise, the Archibald case is the last pronouncement of the Mississippi court in this regard and is controlling and was controlling on the court of appeals.

Petitioner refers to the Mississippi case of *Berryhill* v. *Nichols*, 171 Miss. 769, 158 So. 470, and asserts that this case holds that recovery for pain and suffering in a wrongful death action is not to be had by the next of kin of a deceased or by his heirs at law, but that recovery can only be had in a suit by a personal representative. Petitioner asserts that this case thus urged and cited was ignored by the opinion of the circuit court of appeals. With deference, the circuit court of appeals ignored this case because the same is not applicable, and, further, with deference, the case does not hold as petitioner asserts.

Section 510, Mississippi Code of 1930, provides that in a suit by any person designated in the statute, the same shall be for the benefit of all persons entitled to

recover, and such recovery shall be had *for all damages of every kind* to any and all parties interested. Such holding as contended by petitioner would be in direct conflict with the plain provisions of the statute. The Berryhill case was by certain named beneficiaries as plaintiffs for an alleged wrongful death under Section 510 of the Mississippi Code of 1930, and for all damages, including pain and suffering prior to the death. The Mississippi court simply held in that case that there was not sufficient evidence that the negligence complained of occasioned the death and, therefore, there did not exist an action for wrongful death. The right of any action vested in any party named by Section 510 depends upon the existence of a wrongful death, and the right vested in any part named by Section 510 to recover for pain and suffering endured by the decedent prior to his death likewise depends upon the existence of a wrongful death. Since the court held that there was no wrongful death, recovery for pain and suffering without a wrongful death was not vested in the beneficiaries by said Section 510, but was an item necessarily recoverable by the administrator under his general powers as any other item or claim which the decedent might have prosecuted had he lived, and which existed prior to his death.

To illustrate what is meant by the decision of the Mississippi court in the Berryhill case: A is struck by an automobile negligently operated and sustains personal injury. While convalescing therefrom, he is struck by lightning and killed. There can be no recovery by the beneficiaries under Section 510 of the Code for damages on account of the pain and suffering occasioned by the personal injury sustained because the requisite wrongful death does not exist. In such case, such action must be maintained by the general administrator under his general powers to collect an asset of the estate and to prosecute a claim which existed in decedent prior to his death.

The Mississippi Court has repeatedly held that in a suit by the decedent's beneficiaries for wrongful death, pain and suffering endured by deceased prior to death are recoverable. *Cumberland Tel. & Tel. Co.* v. *Anderson,* 89 Miss. 732, 41 So. 263; *Belzoni Lbr. Co.* v. *Cinquimani,* 137 Miss. 72, 102 So. 470; *Murry* v. *Cotton,* 169 Miss. 521, 152 So. 657.

In any event, the *Archibald Case, supra,* is the last pronouncement of the Mississippi court and is controlling.

Sections 673, 674, 1628 and 1712 of the Mississippi Code of 1930, referred to in the petition, are not involved here. These sections have to do with an action by an executor or administrator in connection with the general assets of an estate, the title to which is vested in the executor or administrator by virtue of his appointment as such. Where damages for wrongful death are sought to be recovered, Section 510 of the Mississippi Code is the sole section involved. See *Hamel* v. *Railroad,* 108 Miss. 172, 66 So. 426, 809.

No substantive rights of the beneficiaries are barred by the order of dismissal in this case. It is not a decision on the merits. The state courts of Mississippi are open for the benefit of the beneficiaries to assert whatever rights they may have. The suit is governed by the Mississippi six year statute of limitations, which does not expire until March, 1944.

Conclusion.

We respectfully submit that this is not a case in which certiorari should be granted. The decision of the circuit court of appeals involved is not in conflict with any decision of this court or with any decision of any of the courts of appeal. In reality and in fact, this case does not involve a question of federal jurisdiction. It simply involves the status of a party in a cause of action created by the Mississippi statute as such status is fixed by said

statute, and as the same is construed by the Supreme Court of the State of Mississippi. The circuit court of appeals in its opinion has followed the decision of the Supreme Court of the State of Mississippi, construing the statute of the State of Mississippi by which the status of the party is fixed, and respondents respectfully submit the decision of the court of appeals for the fifth circuit is correct and that this record does not present a case which calls for the exercise by this court of its supervisory powers or for the granting of the writ of certiorari prayed for.

Respectfully submitted,

WILLIAM H. WATKINS,
Jackson, Mississippi,
GEORGE BUTLER,
Jackson, Mississippi,
CHARLES B. SNOW,
Jackson, Mississippi,
Attorneys for Respondents.

We have this day delivered to Mr. Webb M. Mize, one of the attorneys of record for petitioner, a true copy of the foregoing response.

This June ....., 1941.

APPENDIX A.

Section 510, Mississippi Code, 1930.

"510. Actions for injuries producing death.--Whenever the death of any person shall be caused by any real wrongful or negligent act, or omission, or by such unsafe machinery, way or appliances as would, if death had not ensued, have entitled the party injured, or damaged thereby to maintain an action and recover damages in respect thereof, and such deceased persons shall have left a widow or children, or both, or husband, or father, or mother, or sister, or brother, the person or corporation, or both that would have been liable if death had not ensued, and the representatives of such person shall be liable for damages, notwithstanding the death, and the fact that death was instantaneous shall, in no case affect the right of recovery. The action for such damages may be brought in the name of the personal representative of the deceased person, for the benefit of all persons entitled under the law to recover or by widow, for the death of her husband, or by the husband for the death of the wife, or by the parent for the death of a child, or in the name of a child, or in the name of a child for the death of a parent, or by a brother for the death of a sister, or by a sister for the death of a brother, or by a sister for the death of a sister, or a brother for the death of a brother, or all parties interested may join in the suit, and there shall be but one suit for the same death which shall ensue for the benefit of all parties concerned, but the determination of such suit shall not bar another action unless it be decided on its merits. In such action the party or parties suing shall recover such damages as the jury may determine to be just, taking into consideration all the damages of every kind to decedent and all damages of every kind to any and all parties interested in the suit.

"This section shall apply to all personal injuries of servants and employees received in the service of business of the master or employer, where such injuries result in death. Damages recovered under the provisions of this section shall not be subject to the payment of the debts or liabilities of the deceased, except as hereinafter provided, and such damages shall be distributed as follows:

"Damages for the injury and death of a married man shall be equally distributed to his wife and children, and if he has no children all shall go to his wife; damages for the injury and death of a married woman shall be equally distributed to the husband and children, and if she has no children all shall go to the husband; and if the deceased has no husband or wife the damages shall be equally distributed to the children; if the deceased has no husband, nor wife, nor children, the damages shall be distributed equally to the father, mother, brothers and sisters, or such of them as the deceased may have living at his or her death. If the deceased have neither husband, or wife, or children, or father, or mother, or sister, or brother, then the damages shall go to the legal representative, subject to debts and general distribution, and the fact that the deceased was instantly killed shall not affect the right of the legal representative to recover. The provisions of this section shall apply to illegitimate children on account of the death of the mother and to the mother on account of the death of an illegitimate child or children, and they shall have all the benefits, rights and remedies conferred by this section on legitimates.

"If the deceased be illegitimate and shall leave neither mother, child nor lawful heirs, then all the provisions of this section shall extend and apply to the legal representatives, and the other natural blood relatives of deceased the same as if they were his legitimate relatives and heirs, excepting his father and his father's relatives unless they be full brothers or sisters of deceased, or their heirs."

APPENDIX "B."

Decision of Mississippi Supreme Court

MISSISSIPPI POWER CO. v. ARCHIBALD
189 Miss. 332, 196 So. 760

McGEHEE, Justice.

The intestate, James V. Swearingen, received an electric shock while engaged in throwing a piece of baling wire over the 2,300 volt electric transmission lines of the distribution system belonging to the state of Mississippi, and constituting a part of the East Mississippi Insane Hospital property at Meridian in Lauderdale county, Mississippi, and from which shock and injury he later died.

It may be assumed for the purposes of this decision, and as the testimony tends to show, that the deceased had a fixed place of residence in Kemper county, Mississippi, at the time of his death, although employed as an attendant at the said Insane Hospital, where he then resided with his wife and children while so employed.

The appellant, a non-resident corporation, chartered and domiciled in the state of Maine, was sued as the sole defendant, and charged with negligence in transmitting electric current through the high powered lines over which the baling wire was thrown, where the wires, uninsulated, had been installed and located by the state several years prior thereto, in close proximity to a building on which the deceased was standing when he threw the baling wire which was to be tied to a radio aerial, so that the aerial might be pulled over the transmission line, and fastened to the upper story of the building.

James P. Archibald, administrator, appellee herein, is also a resident of the state of Maine. It appears that the widow of the said James V. Swearingen, deceased, waived

her right to be the administratrix of his estate, and permitted the said Archibald to be appointed as administrator. Letters of administration, or an ancillary administraton, was granted by the Chancery Court of Kemper county, Mississippi, on the 5th day of October, 1938, and on which date the said James P. Archibald, as such administrator, instituted this suit, returnable to the November term of the Circuit Court of said county. On the return day the appellant filed its petition and bond for the removal of the case to the district court of the United States for the eastern division of the southern district of Mississippi, sitting at Meridian; after notice of its intention to present the petition had been duly given. The petition alleged, among other things, that James C. Swearingen, deceased, left surviving him his widow, Mrs. Beatrice Swearingen, and his three minor children, Osborne, Lucile and Kennedy Swearingen, all of whom were at the commencement of this suit, and continuously thereafter have been and now are, resident citizens of the state of Mississippi, and the only real parties in interest in the suit under and by virtue of section 510 of the Code of 1930, which provided, in substance, that all damages of every kind suffered by the deceased, and which may also accrue by reason of his wrongful death, inure exclusively to his widow and children, free of the debts and claims against his estate. A demurrer was sustained to the petition and the removal of the cause denied. The action of the trial court in that behalf is here assigned as error.

A peremptory instruction was also requested, on the ground that the State, and not the appellant, installed the wires complained of, and determined their location as to safety; and on the further ground that the proximity of the wires to the building referred to was not the proximate cause of the accident. The instruction having been refused, the cause was submitted to the jury on the evidence, and a verdict rendered in favor of appellee for the sum of $10,000. However, it is unnecessary that we

consider any error alleged and assigned, other than the refusal to grant an order removing the cause to the United States District Court.

It may be conceded that the question of fraudulent joinder is not here involved in a legal sense, nor is any point made as to the motive of the real parties in interest in arranging to have a citizen of the state of Maine to qualify as administrator, and bring the suit against a resident defendant of that state to avoid a diversity of citizenship between the nominal plaintiff and the said sole defendant, although the purpose in taking such course is obvious.

The appellant, as we understand, concedes in its brief that the particular question of whether the residence of an administrator may ordinarily be determinative of diversity of citizenship is settled in the affirmative by the decisions of the Supreme Court of the United States, but we construe such admission to mean that such is true only where the estate being administered by him has some interest in the recovery sought, for we find section 510 of the Code of Mississippi of 1930, cited, emphasized and relied upon by it in support of the petition for removal, on the ground that under said statute the administrator is a mere nominal, rather than a real party in interest.

Section 510, supra, provides that damages for the wrongful injury and death of a married man shall be equally distributed to his wife and children, if he leaves such surviving him. The suit to recover such damages may be brought in the name of the personal representative for the benefit of the persons entitled under the law to recover, or by the widow for her own benefit, and on behalf of the children. The personal representative is not a necessary party where any of the persons entitled to recover under the law survive the deceased. He is not entitled, in behalf of the estate, to any part of the recovery, if any, that may be had. It is exempt

in favor of the widow and children from the payment of any debts owing by the estate. He cannot administer on it as an asset so as to be entitled to commissions thereon as part of his compensation as an administrator. In other words, it is their right of action, and the law permits them, in their discretion, to sue either in his name or in their own to recover the damages accruing to them, and to them alone. In the case at bar he is purely a formal party, with no more interest in the litigation, so far as the estate is concerned, than a next friend would have. No title to damages recoverable for the wrongful death of a person ever vests in an administrator under said section 510, supra, by virtue of his appointment, where the deceased leaves surviving him those entitled under the law to recover the damages sustained. Unless asked to lend his name as nominal plaintiff, the suit is of no concern to him. Moreover, if his name is used, the estate is neither benefited by a recovery nor adversely affected by a failure to sustain the cause of action sued on. The real actors in this suit, under the statute here under consideration, are the resident widow and children of James V. Swearingen, deceased, on one side, and the non-resident defendant on the other. In no just or reasonable view of the law governing the jurisdiction of the Federal Court in such cases can the personal representative be deemed the real party litigant in a suit brought under the statute here involved, where both the cause of action, and any recovery had thereon, is for the sole benefit of the widow and children. The statute specifically says that the recoverable damages "shall go to" the legal representative and be subject to debts only in the event there are none of the next of kin described in the statute entitled to recovery. Neither the damages to the decedent, nor to the widow and children in this case "go to" the personal representative of the estate in any event, and he is clearly not the person under the facts in this case "entitled under the law to recover."

[1-3] We are therefore of the opinion that the cause was removable to the District Court of the United States, as prayed for. McNutt v. Bland, 2 How. 9, 11 L.Ed. 159; New York Evening Post v. Chaloner, 2 Cir., 265 F. 204, 214; Irvine v. Lowry, 14 Pet. 293, 300, 10 L.Ed. 462. The rule that ordinarily the residence of the administrator controls on the issue of diversity of citizenship on removal is based upon the fact that he has the legal title by virtue of his appointment. Hess v. Reynolds, 113 U.S. 73, 5 S.Ct. 377, 28 L.Ed. 927; Amory v. Amory, 95 U.S. 186, 24 L.Ed. 428; Baltimore & O. R. R. Co. v. Koontz, 104 U.S. 5, 26 L.Ed. 643; Bonnafee v. Williams, 3 How. 574, 11 L.Ed. 732. Compare Webb v. So. Ry., 5 Cir., 248 F. 618, certiorari denied, 247 U.S. 518, 38 S.Ct. 582, 62 L.Ed. 1245, and compare Bogue v. Chicago, etc., D.C.,193 F. 728. But no title to the cause of action, or right to the damages sustained, accrues to him under section 510, Code of 1930, by virtue of his appointment. In bringing the suit he may be ignored entirely by those entitled to recover, for the reason that he has no beneficial interest in the claim or demand. On the other hand, those entitled to the recovery, if any, may in their discretion sue in his name as a nominal plaintiff, but they cannot, by electing to do so, deprive the Federal Court of the jurisdiction vested in it by virtue of the diversity of citizenship here existing between the real and only parties in interest.

Reversed and remanded.